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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS E. CARTWRIGHT,

Defendant and Appellant.

D049069

(Super. Ct. No. SCD192976)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

Thomas E. Cartwright entered a guilty plea to one count of transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a)),¹ and one count of possession of cocaine base for sale (§ 11351.5). Cartwright also admitted that he had twice been convicted of predicate drug offenses within the meaning of section 11370.2,

¹ Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

subdivision (a), giving rise to sentencing enhancements for both of those prior convictions, and that he had suffered two prior serious or violent felonies constituting strike priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d) (the Three Strikes law)).

At sentencing, the trial court exercised its discretion (1) to strike *one* of Cartwright's strike priors, and (2) to strike both of the enhancement allegations made pursuant to section 11370.2, subdivision (a). The trial court sentenced Cartwright to prison for eight years.

Cartwright contends that the trial court abused its discretion in failing to strike *both* of his strike priors. We conclude that Cartwright's argument is without merit. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, acting on information they had obtained through a wiretap, police officers stopped and searched Cartwright's van and found approximately 5 grams of cocaine base. Cartwright was charged with transportation of cocaine base (§ 11352, subd. (a)) and possession of cocaine base for sale (§ 11351.5).

After the trial court denied Cartwright's motion to suppress evidence, Cartwright pled guilty to the two counts with which he was charged.² He also admitted (1) to two prior drug offenses within the meaning of section 11370.2, subdivision (a), and (2) two prior serious felony strikes under the Three Strikes law. The prior strikes were 1983 robbery convictions, arising from robberies committed in 1982 when Cartwright was 16 years old.³

At sentencing, Cartwright requested that the trial court exercise its authority under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531 (*Romero*) and Penal Code section 1385 to strike both of his prior strikes. Cartwright argued that because he is a paraplegic confined to a wheelchair, time spent in custody would be "far more punitive" for him than for other inmates. Cartwright also argued that his two robbery convictions were remote in time, and that his convictions since 1983 have all been nonviolent drug-related offenses.⁴ He argued that a drug treatment program would be more appropriate than incarceration.

² Cartwright "pled to the sheet," without obtaining any deal from the district attorney.

³ According to the probation officer's report, the first conviction involved the robbery of a pharmacy, during which the cashier's ankles and wrists were bound with a phone cord, and during which Cartwright's codefendant brandished a hunting knife. The second conviction involved the robbery of a 69-year-old woman, who was forced into the back seat of her own car and then driven around before she was released.

⁴ In 1986, Cartwright was convicted of use of a controlled substance (PCP) (§ 11550, subd. (b)), and was put on probation. In 1991, Cartwright pled guilty to selling cocaine base to an undercover officer (§ 11352) and was again put on probation, with a four-year prison sentence stayed by the court. In 1996, Cartwright was convicted of

The district attorney advocated that the trial court should strike *one* of Cartwright's prior strikes, but not both.

The trial court examined both the prior strikes and the current offense in determining whether to strike the prior strikes. The trial court observed that the 1983 robbery convictions "occurred at a time when this gentleman was still a teenager. The unfortunate part . . . with the strikes, it is exactly the type of violent felony, including the use of a weapon . . . handled by the codefendant[,] that the strike law was designed to apply to." With respect to the current offense, the trial court stated that "[i]t is neither violent nor serious, as defined by law. The intervening conduct of this defendant since 1982 has been marked by consistent criminality at a relatively low level. [T]hese are mostly possession of controlled substance type offenses, and the sales priors."

The trial court concluded that "it is within the exercise of discretion and within the spirit of the strike law to strike one of the two strikes and leave the one remaining. I order it for the reasons that I have just discussed."

The trial court also struck both of the enhancement allegations that were alleged under section 11370.2, subdivision (a).

driving under the influence of PCP and was again put on probation. Between 1996 and 1998, Cartwright committed a series of driving-related offenses, including one more instance of driving under the influence of PCP. In 1999, Cartwright was convicted of use of a controlled substance (§ 11550, subd. (a)) and was placed on probation. In 2000, Cartwright pled guilty to transportation of a controlled substance (§ 11352, subd. (a)) and possession of cocaine base for sale (§ 11351.5). The trial court again placed Cartwright on probation. In imposing probation for the 2000 offense, the court apparently exercised its discretion to strike Cartwright's two prior strikes, i.e., the 1983 robbery convictions.

Noting that Cartwright's prior conviction for drug sales made him ineligible for probation pursuant to Penal Code section 1203.07, subdivision (a)(11), and that Cartwright was also ineligible for probation because of the remaining strike, the trial court denied probation and sentenced Cartwright to eight years in prison.

Cartwright appeals from the sentence, arguing that the trial court abused its discretion in refusing to strike *both* of his prior strikes.

II

DISCUSSION

A. *Applicable Legal Principles*

Cartwright's appeal raises the single issue of whether the trial court erred in refusing to strike both of his prior strikes.⁵ Thus, we first discuss the legal principles applicable to our review of a trial court's refusal to strike a defendant's prior strike.

As established in *Romero, supra*, 13 Cal.4th 497, a trial court may strike a finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony on its "own motion or upon the application of the prosecuting

⁵ In light of the fact that Cartwright entered into a plea agreement in which he waived his right to appeal "issues related to strike priors," among other things, Cartwright's opening brief extensively addresses whether he waived his right to appeal from the sentence. The Attorney General does *not* address the issue and thus does not appear to take the position that Cartwright has waived his right to pursue this appeal. In light of our decision on the merits we need not, and do not, consider the waiver issue. We note, however, the general rule that "[a] defendant may seek review of the denial of a section 1385 motion [to strike a prior strike] made after the entry of a guilty plea." (*People v. Jones* (2002) 101 Cal.App.4th 220, 226; see also *People v. Lloyd* (1998) 17 Cal.4th 658, 665.)

attorney . . . in furtherance of justice." (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*), citing *Romero, supra*, 13 Cal.4th 497.)

The trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary." (*Id.* at p. 376.) "In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*Id.* at pp. 376-377.) Second, "[a]n appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge," and consequently, the trial court's "decision will not be reversed merely because reasonable people might disagree." (*Id.* at p. 377.) Taken together, these two precepts establish the overarching principle on review that "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

B. *The Trial Court Did Not Abuse Its Discretion by Allegedly Basing Its Decision Not to Strike Both Prior Strikes on Cartwright's Ineligibility for Probation*

The trial court struck only one of Cartwright's prior strikes. The existence of the remaining strike gave rise to several consequences, including ineligibility for probation and ineligibility to be committed to the California Rehabilitation Center (CRC). (Pen. Code, § 667, subd. (c)(2), (4).) Cartwright contends that the trial court erred because it

premised its decision to strike only one prior strike on the allegedly incorrect assumption that under Penal Code section 1203.07, subdivision (a)(11), *even if* it struck both of Cartwright's prior strikes, he still would not be eligible for probation.⁶ We reject Cartwright's argument for two separate reasons.

First, Cartwright mischaracterizes the grounds for the trial court's decision. Although the trial court discussed, during the sentencing hearing, the fact that Cartwright would be ineligible for probation because of Penal Code section 1203.07, subdivision (a)(11), the trial court's express reasons for deciding to strike one of Cartwright's prior strikes did *not* include the fact that Cartwright was ineligible for probation.⁷

Second, even if the trial court *did* rely on an assumption that Cartwright was ineligible for probation, that assumption was accurate based on Penal Code section 1203.07, subdivision (a)(11).

⁶ Penal Code section 1203.07, subdivision (a)(11) prevents a trial court from granting probation where, as relevant here, a defendant is convicted of "violating Section . . . 11351.5 . . . by possessing for sale cocaine base . . . and who has one or more convictions for violating Section[s] 11351.5 [or] 11352."

⁷ Cartwright apparently is relying on the colloquy that the trial court had with defense counsel during the sentencing hearing. Near the beginning of the hearing, defense counsel asked the trial court what its "inclination" was "toward the strike situation." The trial court stated, "Well, let me turn the tables on you You want to know what the court is going to do with the strikes. Assuming for the sake of argument, if all the strikes are stricken, isn't this a mandatory prison case?" The trial court then went on to explain that it believed that Cartwright was ineligible for probation because of Penal Code section 1203.07, subdivision (a)(11). At no point during this discussion did the trial court indicate that there was any connection between Cartwright's ineligibility for probation and its analysis as to whether it should strike both of Cartwright's prior strikes.

As we have noted, Penal Code section 1203.07, subdivision (a) creates ineligibility for probation for any defendant "convicted of violating Section . . . 11351.5 . . . of the Health and Safety Code by possessing for sale cocaine base . . . and who has one or more convictions for violating Section[s] 11351.5 [or] 11352."⁸ Section 1203.07, subdivision (b) establishes the manner in which prior convictions must be established. "The existence of any fact which would make a person ineligible for probation under subdivision (a) shall be alleged in the information or indictment, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury."⁹ Cartwright contends that his prior convictions for violating sections 11351.5 and 11352 were not sufficiently established, and thus the probation ineligibility provision of section 1203.07, subdivision (a)(11) does not apply to him. He is wrong.

Here, the information alleged Cartwright's prior convictions under sections 11352 and 11351.5. During his guilty plea in open court, Cartwright admitted that he had

⁸ The statute further notes that "[f]or purposes of prior convictions under Section[] 11352 . . . , this subdivision shall not apply to the transportation, offering to transport, or attempting to transport a controlled substance." (§ 1203.07, subd. (a)(11).) The probation officer's report indicates that at least one of Cartwright's convictions under section 11352 was for *use* of a controlled substance, not for transporting it.

⁹ Cartwright appears to believe that the statute requires a *trial court finding* as to the existence of his prior convictions, and that his admission to the convictions in open court is not enough. He is mistaken. The statute clearly states that the prior convictions may either be established when "admitted by the defendant in open court" *or* when "found to be true" by the court or other trier of fact. (§ 1203.07, subd. (b).)

incurred "a possession for sale conviction" from 2000 and a "sales conviction" from 1991. The probation officer's report established that those convictions were under sections 11352 and 11351.5. Consistent with this admission, in his signed plea agreement Cartwright specifically admitted to a 1991 conviction under section 11351.5 and a 2000 conviction under section 11352. Thus, the requirements of section 1203.07, subdivision (b) were met in that (1) Cartwright's prior convictions under sections 11352 and 11351.5 were alleged in the information and (2) they were "admitted by the defendant in open court." (§ 1203.07, subd. (b).)¹⁰

C. *The Trial Court Did Not Abuse Its Discretion in Light of the Fact of Cartwright's Disability and History of Drug Use*

Cartwright contends that because he is a paraplegic confined to a wheelchair and because (based on his substance abuse problem) he could benefit from commitment to the

¹⁰ As we have noted, the trial court exercised its discretion to strike the sentencing enhancements that were predicated on Cartwright's convictions for selling drugs in violation of sections 11352 and 11351.5. Cartwright argues that because the trial court struck sentencing enhancements that were based on the prior drug sales convictions, it should *also* have disregarded those prior drug sales convictions when determining whether Cartwright was ineligible for probation under section 1203.07, subdivision (a)(11). We reject this argument. Discretion to strike sentencing enhancements and discretion to disregard probation ineligibility are two separate issues. Even though the trial court had the discretion to strike sentencing enhancements that were premised on prior drug sales convictions (see Pen. Code, § 1385), it did *not* have the discretion to disregard Cartwright's probation ineligibility even though the ineligibility also stemmed from his prior drug sales convictions. A trial court is *prevented* by section 1203.07, subdivision (a)(11) from granting probation to defendants convicted of violating section 11351.5 who were previously convicted of selling drugs in violation of sections 11352 or 11351.5. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 694 ["the Legislature intended section 1203.07, subdivision (a)(11), to eliminate the trial court's section 1385 discretion to strike a prior conviction finding to render a defendant eligible for probation"].)

CRC, the trial court abused its discretion in not striking both of the prior strikes so that he could be committed to the CRC. We conclude that Cartwright's argument is without merit.

The trial court had broad discretion in determining whether to strike both of Cartwright's prior strikes. A trial court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.) Among other things, a trial court abuses its discretion if "'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.'" (*Romero, supra*, 13 Cal.4th at p. 531.) Further, the trial court must set forth its reasons for striking a strike prior. (*Ibid.*)

Here, the record shows that the trial court reasonably exercised its discretion and stated its reasons as required. It considered the nature of Cartwright's prior strikes. It also considered the nature of Cartwright's current offense and the existence of his lengthy criminal history. It was within reason for the trial court to conclude that because of his lengthy and continuous criminal history Cartwright was not wholly "outside the scheme's spirit" (*Williams, supra*, 17 Cal.4th at p. 161), and that it should strike one, but not both, of Cartwright's prior strikes. We cannot conclude that the trial court's refusal to strike

both of Cartwright's prior strikes was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.)

Cartwright argues that the trial court "did not properly consider [his] paraplegia in exercising its discretion." He argues that the trial court "therefore acted arbitrarily in declining to strike the strike and in doubling the sentence." Cartwright also argues that the trial court should have considered that he would benefit from commitment to the CRC, rather than commitment to prison. We find no basis in law for *requiring* that a trial court expressly consider a defendant's physical disability in determining whether to strike a prior strike.¹¹ Nor do we find a requirement in law for the trial court to expressly consider whether a defendant would benefit from commitment to the CRC. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 [in the context of rejecting a challenge to a sentence under the Three Strikes law as cruel and unusual punishment, the court stated that "drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].) Instead, as we have explained, the trial court here could, and did, properly rely on the nature of Cartwright's criminal history in deciding whether to exercise its discretion to strike both of his prior strikes. (See *Williams, supra*, 17 Cal.4th at p. 161 [the trial court may base its decision on the nature of the defendant's crimes and the particulars of his background, character, and prospects].) We find no error.

¹¹ Indeed, Cartwright concedes that he has "found no published cases which address the manner in which the defendant's paralysis should be factored into the equation."

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.